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Brief for Appellants

Feb. 19, 1898.

In the

Supreme Court of the United States,

OCTOBER TERM, A. D. 1897.

No. 538.

HOPKINS et al.,
Appellants,

vs.

UNITED STATES,
Appellee.

On Certificate from and Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF JOHN S. MILLER, FOR THE APPELLANTS.

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vs.
THE UNITED STATES, *Appellee.*

On Certificate from and Writ of *Certiorari* to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF JOHN S. MILLER, FOR THE APPELLANTS.

The writer of this brief is the counsel of The Chicago Live Stock Exchange and of other live stock exchanges, which, while not parties of record to this present suit, are affected by its decision. He appears here and files this brief, by authority of and for the appellants.

There are similar live stock exchanges to that of which the appellants are members, in Chicago, East St. Louis, St. Louis, South Omaha, Sioux City, Fort Worth, and other cities. Some of them are incorporated associations under the laws of the respective states where they are situated, others are voluntary, unincorporated associations. These associations, including the Kansas City Exchange, of which appellants are members, were or-

ganized, and their rules adopted, so far as appears, prior to the passage of the act of Congress of July 2, 1890. The appellant Exchange was formed in 1886, as a voluntary, unincorporated association, whose articles of association and whose rules are the voluntary agreement of the members. The purpose of the appellant exchange, as stated in its agreement of association, is that "of organizing and maintaining a business exchange, not for pecuniary profit or gain, nor for the transaction of business, but to promote and protect all interests connected with the buying and selling of live stock at the Kansas City Stock Yards, and to promulgate and enforce amongst the members correct and high moral principles in the transaction of business;" and for the purpose aforesaid, the members agree each with the other to observe and be bound by the rules and by-laws of the association. (Print. Trans., p. 27.) Any person of good character, and of legal age, whose interests are centered at the Kansas City Stock Yards, is qualified for membership; but the larger number of the members are engaged at the Kansas City Stock Yards as commission merchants or brokers, who receive consignments of live stock for sale at those yards and sell and account for the proceeds of the same to the shippers, for a compensation or commission charged for such services. The leading features of the rules of the appellant exchange which are agreed to by the members are these:

1. The requirement that the members shall comply promptly with the terms of their business contracts and obligations, and the prevention of improper conduct on the part of members, or the willful violation of business contracts or obligations, acts of bad faith, attempts at extortion or other dishonorable or dishonest conduct on

the part of any member. (Pr. Tr., pp. 31, 32; Rule 4, Secs. 6 and 7.)

2. Provision for means of arbitration of disputed claims voluntarily submitted to the board of arbitration thereby provided, by members of the Exchange, and the provision for a review of any award made upon any such arbitration, and the prompt and speedy hearing and determination of controversies between members by means of such arbitration. (Rule 7, Pr. Tr., 37 to 40.)

3. Provision for looking after transportation rates in the interest of patrons of the members of the Exchange. (Rule 17, Pr. Tr., 48.)

4. Provision for securing for shippers of live stock to members of the Exchange at the Kansas City yards, payment for their live stock sold, where such live stock may be purchased by "dealers"—a class containing some irresponsible men—who may pay for live stock through commission merchants, members of the Exchange, by requiring beforehand from members a disclosure and list of such dealers, for whom members of the Exchange will undertake to be responsible. (Rule 21, Pr. Tr., 49.)

5. Provides for a just and uniform system of inspection by competent inspectors of hogs shipped to said yards for sale, and a regulation, in the interest of the shippers, of the amount of "dockage or shrinkage" allowed pregnant sows and stags, and against the sale of injured or diseased hogs. (Pr. Tr., 52–55.)

There are these further features in the rules, which are here next stated separately, because they are the point of attack which is made by the Government upon the appellants in this case:

6. A rule fixing the minimum rate of commissions to be charged by members of the Exchange for selling live stock, and, in that connection, regulating the employment of solicitors and the prepayment of telegrams and messages, through which means the evasions of the commission rule and other rules are most likely to occur. (Rule 9, Pr. Tr., 42 to 46.)

7. A provision that no member shall transact any business with any person violating any of the rules of the Exchange, or with an expelled or suspended member. (Rule 16, Pr. Tr., 49, 50.)

These rules being agreed to and observed by the honorable members of the Exchange, and enforced as the rules against those who violate them, the question presented in this case is :

Does this association of men come within the condemnation of the act of Congress of July 2, 1890, which was passed to protect trade and commerce against unlawful restraints and monopolies ?

The injunction order in this case, which is here sought to be reviewed, orders and decrees:

> "That the defendants herein, and each and every one of them, their agents, servants and employes, be and they are hereby enjoined, either as associates in the Kansas City Live Stock Exchange, or otherwise, from combining, by contract, agreement or understanding, express or implied, so as by their acts, conduct or words to interfere with, hinder or impede others in shipping, trading, selling or buying live stock that is received from the states and territories at what is known as the stock yards at Kansas City, Missouri, and Kansas City, Kansas, and shipped there from other states and territories for sale there or for further transportation, or for sale in, or shipment to foreign markets.

"And it is further ordered and decreed that the said defendants either collectively as such Kansas City Live Stock Exchange, or through its board of directors, or otherwise, and each of them, their agents, servants or employes, be and they are hereby enjoined from enforcing, or recognizing, or acting under the following rules of said Kansas City Live Stock Exchange, to wit: rules 9 and 16, each and every section thereof, and any and all amendments thereto in respect to such live stock, and from imposing, or attempting to impose any fines or penalties upon any of the members of said Kansas City Live Stock Exchange, for trading or offering to trade with any person or persons at said stock yards, respecting the purchase and sale of any such live stock; or from discriminating in favor of any member of said Kansas City Live Stock Exchange, because of such membership; and especially from in any manner discriminating against any person trading at said stock yards in such live stock, and from refusing, by united or concerted action, or by word, persuasion, threat or other means, to deal or trade with persons with respect to such live stock, who are not members of said association, because of such non-membership; or in any manner from interfering with the right and freedom of any and all persons trading and desiring to trade in such live stock, at said stock yards, and the same as if such Kansas City Live Stock Exchange did not exist.

"And it is further ordered and decreed that the defendants, and each of them, their servants, agents and employes, be and they are hereby [joined] and prohibited from entering into any contract, agreement, combination or conspiracy fixing or tending to fix, directly or indirectly, the price to be charged as commission for buying or selling live stock, shipped from one state or territory for sale or disposition in another state or territory or in foreign countries, also from entering into any contract, agreement, combination or conspiracy limiting or attempting to limit the right of any person in business at Kansas City stock yards to employ labor or assistance in

soliciting shipments of live stock from other states or territories, or the right of any such person to send telegrams, prepaid or not, from said stock yards to any other state or territory." (Print. trans., 277-8.)

Of the first paragraph of the injunction order, it may be said that the appellants have done nothing of the kind.

The purposes of the Kansas City Live Stock Exchange or of its rules do not call for or contemplate nor does the association carry out or seek any interference with the conduct of others, but their scope and operation are confined entirely to the members of the Exchange, who agree to be bound thereby. Nor have the acts of the members of the Exchange in obedience of any rule of the Exchange, in any way interfered with the acts or conduct of others, but have been confined to the matter of the business and conduct of themselves.

By the second and third paragraphs of the injunction order the appellants are enjoined—whether they act collectively as such Exchange or through its board of directors, or each acts individually in the exercise of his own personal right—from either enforcing or recognizing or acting under Rules 9 or 16 of the rules of the Exchange, or imposing fines upon members for trading with any person at said stock yards respecting the purchase and sale of any live stock received from the states and territories at the Kansas City stock yards, and from in any way discriminating against any person trading at said stock yards in such live stock, and from refusing to deal or trade with persons with respect to such live stock who are not members of said association, because of such non-membership, and from entering into any contract or agreement, as well as combination or conspiracy, fixing or tending

to fix the price to be charged as commissions for buying or selling live stock shipped from one state or territory for sale or disposition in another state or territory or in foreign countries, and from entering into any contract or agreement, as well as combination or conspiracy, to limit the right of any person in business at said stock yards to employ labor or assistance in soliciting shipments of live stock or to send telegrams prepaid or not from said stock yards to any other state or territory.

It will be seen that the court below has substantially enjoined the appellants from associating at all, respect- the purchase or sale of live stock which is received from the Kansas City stock yards from other states or territories. And it is plain that, at the least, the Circuit Court has construed and applied the act of Congress of July 2, 1890, to extinguish the Kansas City Live Stock Exchange for all purposes, and to forbid the persons who are its members from regulating their own private business in the handling, purchase and sale of such live stock. If Congress had the unrestrained power to deprive appellants of those personal rights of liberty and private property and freedom of contract which are secured as our constitutional right and inheritance, and had enacted a law which in terms extinguished the Kansas City Exchange and forbade the persons who are its members from further continuing their business of the purchase and sale of such live stock, such act could not have a broader or more direct application to sustain the injunction order herein than the learned Circuit Court has given to the act of July 2, 1890, in this case.

The very exhaustive and able argument filed herein by Mr. Krauthoff for the appellants has covered the field of authority and the learning upon the questions involved

in this case, with a thoroughness and industry which leaves nothing to be said that is not well said in that argument. We cannot add anything to his argument; and we shall not try to cover, in this brief, the case as he has done, but shall try to summarize and state with conciseness what we have to say upon such portions of the case as we think we may in this brief touch upon.

Upon the point that the business and dealings of appellants are not interstate commerce among the states within the meaning of the act of July 2, 1890, we shall leave the case upon Mr. Krauthoff's argument and add nothing.

BRIEF.

I. The business of the appellants is *juris privati* and not *juris publici*.

American Live Stock Com. Co. v. *Chicago Live Stock Exchange*, 143 Ill., 210, 236.
Ladd v. *Southern Cotton Press, &c., Co.*, 53 Tex., 172.
Seeligson v. *Taylor Compress Co.*, 56 Tex., 219.
Coggs v. *Bernard*, 2 Ld. Raym., 909.

II. It is only over business, which is affected with a public interest, that such legislative power of regulation and interference exists, as was upheld in *Munn* v. *Illinois*, 94 U. S., 113, and *Budd* v. *New York*, 143 U. S., 517.

III. It was not the purpose of the commerce clause of the Federal Constitution to interfere with the personal right and freedom of private contract as it existed at common law and under the laws of the respective states. *Railroad Co.* v. *Richmond*, 19 Wall., 584, 589–90.

The commerce clause and the power of Congress thereunder are subject to the prohibitions of the fifth and other amendments of the Constitution, which are known as the Bill of Rights.

Monongahela Navgtn. Co. v. *U. S.*, 148 U. S., 310, 336.

And it is perfectly well settled that those amendments were intended to embody those guaranties and immunities which we had inherited from our ancestors.

Robertson v. *Baldwin*, 165 U. S., 281.
Slaughter House Cases, 16 Wall., 36, 82.

It is clear, then, that these guaranties and immunities so embodied in the federal constitution are as secure against an act of Congress as they were against legislation by the states.

Sinking Fund Cases, 99 U. S., 700, 718.
Butchers Union v. *Crescent City Co.*, 111 U. S., 762, per Bradley, J.
Corfield v. *Coryell*, 4 Wash. C. C., 371.

IV. The right and freedom of private contract, and the sanctity of private property, as they have existed, are within that constitutional protection.

And such right and freedom of contract by persons, respecting matters which are *juris privati*, cannot be impaired by Congress. If this can be done at all, it can only be where it is shown that actual injury to the public results from the exercise of such right as it has heretofore existed.

And such injury to the public must be made to appear to the court, in order to sustain such an act of Congress.

V. The act of Congress of July 2, 1890, was not intended to interfere with the right and freedom to contract with respect to their business or employment, by persons engaged in private business or employment, which is not affected with a public use.

If it were so intended, it would be in violation of the Constitution.

Railroad Co. v. *Richmond*, 19 Wall., 584.
Butchers Union v. *Crescent City Co.*, 111 U. S., 746, 762.
Palmer v. *Tingle*, 55 Ohio St., 423; 45 N. E. Rep., 313.

Carew v. *Rutherford*, 106 Mass., 14.
People v. *Gillson*, 109 N. Y., 389.
Frisbie v. *United States*, 157 U. S., 160, 165.
In re Grice, 79 Fed. Rep., 627.
Allgeyer v. *Louisiana*, 165 U. S., 590–92.
Robertson v. *Baldwin*, 165 U. S., 281.
Live Stock Association v. *Crescent City, etc., Co.*, 1 Abb. U. S. R., 398.
People v. *Marx*, 99 N. Y., 377.
In Re Jacobs, 98 N. Y., 98, 107.
Toledo, &c., Ry. v. *Jacksonville*, 67 Ill., 37.
Lake View v. *Rosehill Cemetery*, 70 Ill., 192.
Frorer v. *People*, 141 Ill., 171, 181.
Braceville Coal Co. v. *People*, 147 Ill., 66, 71.

VI. The purposes of the association of appellants here in question are lawful and proper.

Boston, &c., Exchange v. *N. Y., &c., Ry. Co.*, 4 Inter St. C. C. R., 436.
Biddle, Stockbrokers, 40.
Dos Passos Stock Exch., 260, 261.
Melsheimer & Gardner, Stock Exch., 98.
Jones v. *Clifford's Executor*, 5 Fla., 510.
Dillaway v. *Alden*, 88 Me., 286.
Clark v. *Foss*, 7 Biss., 555.

VII. The rules of the association of appellants in question, which are the subject of attack in this suit, and which are the mutual agreements of the members, are

not in restraint of trade within the meaning of the act of July 2, 1890, but in promotion of trade.

Master Stevedores' Assn. v. *Walsh*, 2 Daly, 1.

Matthews v. *Associated Press*, 136 N. Y., 333.

Taff Vale Ry. Co. v. *McNabb*, L. R., 6 H. L., 169.

Printing, &c., Co. v. *Sampson*, L. R., 19 Eq. Cas., 462, 465.

Central Shade Roller Co. v. *Cushman*, 143 Mass., 353.

Live Stock Assn. v. *Levy*, 54 N. Y. Superior Ct. R., 32.

Long v. *Towl*, 42 Mo., 545.

Skrainka v. *Scharringhausen*, 8 Mo. App., 522.

Railroad Co. v. *Fuller*, 17 Wall., 560, 568.

Taff Vale Ry. v. *McNabb*, L. R., 6 H. L., 169, 176.

Nordenfeld v. *Maxim, &c., Co.*, App. Cas., 535.

VIII. The rules of the appellant association are not opposed to any public policy, but are the valid private contracts of the members.

Allgeyer v. *Louisiana*, 165 U. S., 578, 591.

Carew v. *Rutherford*, 106 Mass., 14.

Bowen v. *Matheson*, 14 Allen, 499.

Snow v. *Wheeler*, 113 Mass., 179.

Collins v. *Locke*, L. R., 4 App. Cas., 674.

Commonwealth v. *Hunt*, 4 Metc., 111, 128.

Palmer v. *Stebbins*, 3 Pick., 188.
Master Stevedores' Assn., v. *Walsh*, 2 Daly, 1.
Live Stock Assn. v. *Levi*, 54 N. Y. Superior Ct. R., 32.
Bohn Mfg. Co. v. *Hollis*, 54 Minn., 223.
Jones v. *Clifford's Exr.*, 5 Fla., 510.

IX. The rules of the appellant association which were in force when the act of 1890 was passed, and were then the valid contract of the members, are not affected by that act.

I.

The Business of Appellants is privati juris.

The appellants here are private citizens, engaged in a private business. Their business is not *publici juris* in any sense.

Coggs v. *Bernard*, 2 Ld. Raym., 909.
American Com. Co. v. *Chi. Live Stock Exchg.*, 143 Ill., 210, 236.
Saligman v. *Taylor Compress Co.*, 56 Tex., 219.
Ladd v. *Southern Cotton Pre. Co.*, 53 Tex., 172.

The commission merchants, or brokers, who are members of the Exchange, and whose action or conduct in such business is affected by the rules of the Exchange which are made the chief point of attack by the Government, are engaged in the business of buying and selling live stock for others for a commission charged and paid to them for the personal services of themselves and their employes. There is first to be noted this important dis-

tinction between these men and corporations or persons engaged in a business which is affected with a public interest, such as transportation companies; gas companies enjoying public rights, franchises or licenses; public warehousemen, whose business has been declared *publici juris* by statute, etc. This distinction between the association of persons engaged in a business which is impressed with a public interest and the association of commission merchants who are engaged in a private business is of importance upon the question of the constitutional right of freedom of private contract, and of the application of the trust act of 1890. That distinction has been emphasized in decisions in this court.

Gibbs v. *Baltimore Gas Co.*, 130 U. S., 396, 408.

U. S. v. *Freight Assn.*, 166 U. S., 290, 333–34, 336.

This fact is important in the consideration of the question whether if the act of Congress were to be construed to so restrict and diminish the right and freedom of private contract, as is claimed by the appellee here, it would not invade the protection and immunities of the Constitution. This fact distinguishes this case from the *Trans-Missouri Case*.

The present case presents the question whether the act of July 2, 1890, is to be held to be a beneficent act for the protection of the public against injury to the public interest, or is to be regarded as a mischievous interference with the rights of private citizens and the freedom of private contract. And if the act in question is to be construed as having the scope and extent of application claimed for it by the Government herein, and

given to it by the Circuit Court, this case illustrates admirably how the act may be invoked for the carrying out of private and personal ends; and how little there would be left of the right of private contract, if the act, with that construction, were to be sustained.

In *American Live Stock Commission Co.* v. *Chicago Live Stock Exchange*, 143 Ill., 210, 235-6, 238, it was contended that the members of the Chicago Exchange, doing business at the Union Stock Yards, Chicago, were engaged in a business which was impressed with a public interest, but the court refused to so hold. The court said:

> "It is not claimed that the keeping or doing business in a market of this character is one of the employments which the common law declares to be public; nor is it pretended that it has been made so by statute. Ordinarily the adoption of new rules of public policy, or the application of existing rules to new subjects, is for the legislature, and not for the courts. Accordingly it may be held to be a general, though perhaps not an invariable, rule that the question whether a particular business which has hitherto been deemed to be private is public and impressed with a public use is for the legislature. The doctrine on this subject is stated in *Ladd* v. *Southern Cotton Press Manufacturing Co.*, 53 Texas, 172, where a question very similar to the one under discussion was before the court, as follows: 'We know of no authority, and none has been shown us, for saying that a business strictly *juris privati* will become *juris publici* merely by reason of its extent. If the magnitude of a particular business is such, and the persons affected by it are so numerous, that the interests of society demand that the rules and principles applicable to public employments should be applied to it, this would have to be done by the legislature (if not restrained from doing so by the constitution) before a demand for such use could be enforced by the courts.' The view thus expressed

would seem to be precisely applicable to the present case, and we are inclined to adopt it as a correct statement of the law as it should be applied to the facts before us. We do not say that there may not be exceptions to the rule thus stated, but if there are they are not of such character as to be material here.

"Apart from the consideration that the extension and application of even existing rules of law to subjects not heretofore within their purview is legislative in its nature, the determination by the courts as to the precise point at which a mere private business reaches that stage of growth and expansion which is sufficient to render it *juris publici* would be surrounded with very great difficulties, and would present questions for which the courts, unaided by legislation, would be able to find no just or satisfactory criterion or test. But when the legislature, acting upon a competent state of facts, has interposed and declared the business to be *juris publici*, all difficulty is removed.

"The views here expressed do not conflict with what was decided in *Munn* v. *Illinois*, 94 U. S., 113. The question raised and decided in that case was as to the constitutionality of the act of the legislature of this state, declaring certain grain elevators to be public warehouses, and prescribing rules for their management, and fixing maximum charges for the storage and handling of grain. There the legislative department had interposed and declared the public use, and the court, in holding the act constitutional, held merely that the legislative power had been properly exercised. This was the only question, having any relevancy here, presented in that case or which the court undertook to decide, and the discussion of the evidence showing that the business carried on in said grain elevators was of such character that it had in fact become impressed with a public use, was only for the purpose of showing that a condition of things existed which justified the legislature in passing the statute then under consideration."

II.

It was not the purpose of the Commerce Clause of the Constitution, nor of the Act of July 2, 1890, to interfere with the freedom of private contract.

In *Railroad Company* v. *Richmond*, 19 Wallace, 584, 589-90, this court speaking by Mr. Justice Field said of the effect of the commerce power of Congress as exercised by certain acts then under consideration:

> "These acts were passed under the power vested in Congress to regulate commerce among the several states, and were designed to remove trammels upon transportation between different states, which had previously existed, and to prevent the creation of such trammels in future, and to facilitate railway transportation by authorizing the construction of bridges over the navigable waters of the Mississippi. But they were intended to reach trammels interposed by state enactments or by existing laws of Congress. They were not intended, even if it were competent for Congress to authorize any such proceeding, to invade the domain of private contracts, and annul all such as had been made on the basis of existing legislation and existing means of interstate communication. Contracts valid when made, continue valid, and capable of enforcement, so long, at least, as peace lasts between the governments of the contracting parties, notwithstanding a change in the conditions of business which originally led to their creation.
>
> The power to regulate commerce among the several states was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating state legislation; it was never intended that the power should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse.
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> * * * * *

> When counsel speaks of the public policy established by the acts of Congress mentioned, he must mean nothing more than that the acts were intended to facilitate commercial intercourse among the states. Undoubtedly such was the case, and it is of great public interest that such intercourse should be free and untrammeled. But if comparisons may be made with respect to a subject of this nature, we should say that the observance of good faith between parties, and the upholding of private contracts, and enforcing their obligations, are matters of higher moment and importance to the public welfare, and far more reaching in their consequences."

III.

It is over business which is affected with a public interest that such legislative power of regulation and interference exists as was upheld in Munn v. Illinois and like cases.

It cannot be made a matter of question that the decision in the case of *Munn* v. *Illinois*, was based upon the position that the business there in question was affected with a public interest. It is expressly stated in the opinion that this was the principle "upon which this power of regulation rests," and which the court there inquired into "in order that we may determine what is within and what is without its operative effect." (94 U. S., 125.)

And so in the *Sinking Fund* cases, 99 U. S., 747, this court said of the Munn case that "the inquiry there was as to the question of the police power in cases where the public interest is affected." And the same was said in the case of *Wabash Railway Co.* v. *Illinois*, 118 U. S., 569, and in the case of *Budd* v. *New York*, 143 U. S., 517.

And the rule laid down by this court as to the extent and scope of the police power in regulating the contracts or services of persons or corporations, and the price or compensation to be charged, is bounded by the line which divides that which is *privati juris* from that which is *publici juris*.

This is not to contend that the police power may not in any case regulate the private business of the citizen, or his right of private property. The police power to diminish or impair his right to contract, as it exists at the common law, and as his inheritance, is no greater than and is of the same nature as the police power to diminish or impair his private property. But in every case where such private business which is not impressed with a public interest has been so regulated, it has been in order to prevent an injury to the public welfare; for instance, an injury to the public health. And that question is open to the courts. It must appear to the courts that such public injury exists or will result, and it can safely be said that the power of the legislature to regulate or interfere with the contracts or business of individuals, which are not affected with a public interest, can be sustained only in those cases where such public injury or necessity is plainly shown.

In *People* v. *Gillson*, 109 N. Y., 389, the court, by Mr. Justice PECKHAM, speaking of the provision of the constitution of New York, that no person shall be deprived of life, liberty or property without due process of law, says:

> "A person living under our constitution has the right to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit. The term 'liberty,' as used in the constitution is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarcera-

tion, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livehood in any lawful calling and to pursue any lawful trade or avocation."

And with respect to the police power of the state, the court said:

"That power has never yet been fully described nor its extent plainly limited further, at least, then this: it is not above the constitution, but it is bounded by its provisions; and if any liberty or franchise is expressly protected by any constitutional provision, it cannot be destroyed by any valid exercise, by the legislature or the executive, of the police power. The extent of this power has been the subject of discussion in this court; in the recently most important case of *In re Jacobs*, 98 N. Y., 107, the question was examined and most exhaustively reviewed by Earl, J., in his opinion. To re-open the subject now would be useless, and I refer to that case as authority for the statement that the legislature cannot without reason and arbitrarily infringe upon the liberty or the property rights of any person within the protection of the constitution of this state; and that if the legislature shall determine what is a proper exercise of its police power its decision is subject to the scrutiny of the courts. * * * Under an exercise of the police power the enactment must have reference to the comfort, the safety or the welfare of society, and it must not be in conflict with the constitution. The law will not allow the rights of property to be invaded under the guise of a police regulation for the protection of health, when it is manifest such is not the object and purpose of the regulation. * * * Courts must be

able to say upon a perusal of the enactment that there is some fair, just and reasonable connection between it and the ends above mentioned. Unless such relation exists, the enactment cannot be held up as an exercise of the police power.'"

In *Palmer* v. *Tingle*, 55 Ohio State Rep., 423, the court said that "one of the most valuable and sacred rights is the right to make and enforce contracts"; and continued:

"The word 'liberty,' as used in the first section of the bill of rights, does not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Contracts and compacts have been entered into between men, tribes and nations during all the time from the earliest dawn of history; the right and liberty of contract is one of the inalienable rights of man, fully secured and protected by our constitution, and it may be restrained only in so far as it is necessary for the common welfare and the equal protection and benefit of the people. That such restraint of the right and liberty of contract is for the common, public welfare and equal protection and benefit of the people, must appear, not only to the general assembly, in the face of popular clamor, or the pressure of the lobby, but also to the courts; and it must be so clear that a court of justice, in the calm deliberation of its judgment, may be able to see that such restraint is for the common welfare and equal protection and benefit of the people."

IV.

The power of Congress under the commerce clause of the Constitution is subject to all the limitations by which the police power of the States is restrained.

In *Monongahela Co.* v. *U. S.*, 148 U. S., 310, 336, this court held that the commerce clause and the power of Congress thereunder are subject to the prohibitions of the Fifth Amendment of the Constitution. It is equally clear, under the decisions of this court, that this power of Congress is limited by all of the first ten amendments of the Constitution. The fifth amendment provides that no person "shall be deprived of life, liberty or property without due process of law." Among the first ten amendments of the Constitution this article is the great bulwark, the *Magna Charta* of personal liberty and right, as against any encroachments on the part of Congress.

In *Robertson* v. *Baldwin*, 165 U. S., 281, this court, by Mr. Justice BROWN, said that

> "The law is perfectly well settled that the first ten amendments to the Constitution, known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well recognized exceptions arising from the necessities of the case."

The power of Congress is such as the Constitution gives. It must be found in the provisions of that charter. The power of the legislatures of the states is not given by their constitutions, but is the sovereign power of the people limited only by the restrictions found in the Con-

stitution. The rule of construction of the power of Congress under the commerce clause, and the rule for determining the police power proceed from different standpoints. The police power is the broader and the power of Congress narrower. The guaranties and immunities which are given to the rights of persons, it is clear, cannot be invaded by Congress. But if at all, certainly not where they could not be impaired by state legislation.

The power of Congress is no greater to deny or interfere with the right of stevedores or locomotive engineers or commission men (if they are engaged in or a part of interstate or foreign commerce) to enter into contracts with each other relating to their services or employment or compensation, than that of the legislature of a state to interfere with the contracts of such men respecting services or trade within the state. And such right of contract, as it has always existed, is beyond legislative power to destroy or lessen.

V.

The Act of Congress of July second, 1890, was not intended to interfere with the right and freedom to contract, with respect to their business or employment, of persons engaged in private business or employment, which is not affected with a public use, as such right and freedom exists at the common law. If it were so intended it would be in violation of the Constitution.

We have shown that the power of Congress under the commerce clause of the Constitution is not absolute. It will be observed that in the cases where the Act of July 2, 1890, has been applied and sustained, the business or combinations restrained were illegal and opposed to public policy under the principles of the common law, as held by the court in such decisions. Such was the *Trans-Missouri* decision, 166 U. S., 290, and the case of *United States* v. *Addyston Pipe, &c., Co.*, recently decided by the Circuit Court of Appeals for the Sixth Circuit. In the *Trans-Missouri case*, there was the controlling fact that the contract condemned was of *quasi* public corporations whose business was impressed with a public interest, and that under *common law principles* the agreement was against public policy as held in *Gibbs* v. *Baltimore Gas Co.*, 130 U. S., 308, following *Chicago Gas L. Co.* v. *People's Gas L. Co.*, 121 Ill., 530, and like cases. The contract there was not such a one as the parties were privileged to make under the right of contract secured by the Constitution.

We have shown that the guarantees and immunities which are the birthright of the American citizen, and which are protected by the provisions of and principles

underlying the constitutions of our states, from the arbitrary exercise of what is known as the police power by the legislatures of the states, are also protected against the arbitrary exercise by Congress of the power to regulate commerce. That the right of contract as it exists at the common law is as much within such guarantees and immunities as the right of private property, and stands upon the same footing. That where the business or employment, or private concerns of the private citizen, which are not affected with a public interest, are interfered with or restrained, or the freedom of contract of such citizens, with respect to their own employment or services, or private business is restrained or forbidden, an act of Congress so interfering, if valid at all, can only be sustained where it appears, by the act, that otherwise a public injury would result. Such public injury must appear; otherwise, and where the matter is not *publici juris*, Congress has no right to interfere with the personal liberty and property and the freedom of contract of the citizens, as it has existed at common law. The power of Congress with respect to commerce is to *regulate* commerce. The power to regulate does not include the power to destroy. The purpose for which this power to regulate is given is to promote trade and commerce. The language of the act of July 2, 1890, is general. And if in any case or with respect to any subject-matter of business among citizens of the United States, which the department of justice in the name of the government seeks to bring within the prohibitions of the act, it does not appear to the court that to apply the act to such subject-matter would promote commerce, it is plain that the act must be held not to apply to such subject-matter, or else the act violates the constitution. An act passed to pro-

tect trade and commerce against unlawful restraint cannot be held to intend to restrain trade and commerce or take away the freedom of trade. As we have shown, among the personal rights protected by the constitution is the right of contract. It stands on the same business and has the same sacredness as the right of private property. In *Mitchel* v. *Reynolds*, 1 P. Wms., 181, it was said that the freedom of trade was within the sanctions of *Magna Charta* for the protection of the personal rights of liberty and property. And that has been uniformly laid down in our country of the bill of rights in our constitution. In *Printing, etc., Co.* v. *Sampson*, L. R., 19 Eq. Cas., 462, 465, the court say:

> "It must not be forgotten that you are not to extend arbitrarily these rules which say any contract is void as being against public policy; because there is one thing which more than another public policy requires; it is that men of full age and competent understanding shall have the utmost liberty of contract, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, that you are not lightly to interfere with freedom of contracts."

This has been approved by this court as applicable to the contract of parties whose business is not affected with a public interest.

Gibbs v. *Baltimore Gas Co.*, 130 U. S., 408.

U. S. v. *Freight Association*, 166 U. S., 333.

In *Railroad Co.* v. *Richmond*, 19 Wall., 590, this court says:

> "When counsel speaks for the public policy es-

tablished by the acts of Congress mentioned, he must mean nothing more than that the acts were intended to facilitate commercial intercourse among the states. Undoubtedly such was the case and it is of great public interest that such intercourse should be free and untrammeled. But if comparisons may be made with respect to a subject of this nature, *we should say that the observance of good faith between parties and the upholding of private contracts and enforcing their obligations are matters of higher moment and importance to the public welfare and far more reaching in their consequences.*"

In *Allgeyer* v. *Louisiana*, 165 U. S., 578, this court said of "liberty" as used in the fourteenth amendment (and it has the same meaning as used in the fifth amendment) that "the term is deemed to embrace the right of the citizen * * * to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

The association in question is formed by the agreement of the persons who compose it. And its rules are the mutual agreement of the members with each other. It is an exercise of the same power to associate which is exercised in unions of workmen. It confines its scope and discipline to its own members and their conduct. By its rules they agree merely as to their own conduct of their own affairs.

Plainly, the act of July 2, 1890, to be a valid act must have some limitations. Every contract between two or more persons to limit their trade is not now void. For instance, if two or more partners in business agree together to limit (restrain) their purchases in a certain commodity or line of goods in their business as merchants in interstate commerce, that contract is not void. That

is their right. If this association or its rules do not appear to be injurious to the public interest, then we submit it is clear that the act of Congress was not intended to forbid them. That the act of Congress must be construed, if it is possible, to be intended to be limited to those subjects and purposes upon which it is within the power of Congress to legislate. And that if this association and these rules would not be against public policy and interest, or would inflict no public injury, then if this act of Congress should be held to apply to them, as held by the court below, then the act extends beyond the power of Congress under the constitution. Because such right of contract is within the immunity of the bill of rights. Under this view of the case, it may be material to inquire whether this association and its rules appear to be injurious to the public and against public policy, or whether they are within the constitutional right of the parties to make. And such injury must affirmatively appear to the court.

VI.

The purposes of the Association of appellants here in question are lawful and proper.

It is plain, from reading the agreement and rules of association here in question, that this association is a beneficent one. Its main purpose, as stated in the agreement of association, is that

"of organizing and maintaining a business exchange, not for pecuniary profit or gain, nor for the transaction of business, but to promote and protect all interests connected with the buying and selling of live stock at the Kansas City Stock Yards, and to promulgate and enforce amongst the members correct and high moral principles in the transaction of business." (Print. Trans., p. 27.)

The great benefit and advantage to commerce and trade and to the public of such exchanges, and their historical growth and development in pace with the growth of trade and commerce, have been traced and shown by Mr. Krauthoff in his argument, with such thoroughness and ability that nothing is left to be said upon that point. A consideration of their relations to commerce shows that they promote commerce; and that this has been the occasion and the result of their existence. And this is emphatically true of the appellant association.

VII.

The Association of the appellants and its rules are not in restraint of trade but are in promotion of it.

The leading purpose of this association is the promotion of trade. It so states in the agreement of association. (Pr. Trans., 27.) It regulates the business conduct and integrity of its members; requires, and assures to each from every other, and to the shippers of live stock, the observance of their business obligations, by the members; the prevention of dishonorable dealing; and provides a practical means for the voluntary arbitration of disputes and the prompt hearing and disposition of such controversies. And so it makes possible the transaction by its members of the great business they carry on, and promotes and increases it. This exchange is necessary to the transaction of such business. The conduct of the immense business done at the centers, where exchanges exist, with the speed, skill, integrity, fidelity to obligations, and small expense and loss, which mark it, is only possible because of such

associations. Plainly they promote trade. What they restrain is rascality and inefficiency; they remove the barnacles which impede the progress of the ship. At the Kansas City Stock Yards, in question, during 1896, there were received 113,594 cars of live stock, or 5,471,246 head, having a value of over one hundred million dollars, all sold by word of mouth on terms of cash, but delivered to the buyer necessarily, in the transaction of such business within the time required, before payment is in fact received. This business could only be done with the skill and speed and fidelity with which it is done, because of the existence of this association, and its rules. Do they, then, restrain trade, or promote trade?

In a single respect next mentioned, they do restrain trade; and certain persons who are permitted by the government to conduct this great case on its behalf have felt this restraint. The rules of the Chicago Live Stock Exchange forbid its members, under a penalty, to sell or dispose of diseased live stock, or live stock apparently diseased, without inspection and passing by the state veterinarian. The rules of this Exchange also deal with that evil. (Pr. Trans., 54.) And these persons above referred to, who were members, having been found guilty of a violation of this rule of the Chicago Exchange, against the sale of diseased animals, appealed to the Circuit Court of Cook County, Illinois, for an injunction to restrain the enforcement by the Exchange of the fine imposed by its directors for such violation by suspension or expulsion. But the court sustained the Exchange and dismissed the bill for want of equity. (*Greer, Mills & Co.* v. *Chicago Live Stock Exchange*, Circuit Court of Cook County, Tuley, J., October, 1897, not reported.) Was the act of July 2, 1890, intended to forbid such re-

straints as that? Is it a crime, under its provisions, for commission merchants at the Kansas City or Chicago Stock Yards to agree together not to sell, for purposes of food, diseased cattle or hogs, which are articles of interstate commerce?

This hundred million dollars worth of live stock sold as stated belonged to shippers in Texas, New Mexico, Colorado and remote states and territories, as well as to some in Kansas and Missouri, and it may be bought for a person in Buffalo or Europe. The relations of the commission merchant at the Kansas City or other stock yards, who receives and sells or buys this stock to his shipper in Texas or New Mexico, or his principal wherever he is, must be one of great trust and confidence. If it is left to the absent shipper to discover and correct, dishonesty on the part of the broker is not difficult to carry out and conceal. The shipper cannot himself discover or know of acts of dishonesty in the sale or accounting for consignments, or adequately establish and enforce his rights through the courts. Hence the great occasion and usefulness to the shippers of the rules of the exchange as to the commercial conduct of the members by which any such dishonesty is discovered or prevented by the watchfulness of experienced men upon the ground. So far as the interest of shipper and buyer are concerned, does this association restrain trade, or does it promote trade?

The evil which the learned judge of the Circuit Court appears to have seen in the exchanges of the country was not that they restrain trade, but that they *promote* trade. They certainly do promote trade. The business transacted could not be done but for them and their rules, and

the observance or enforcement of such rules among the members.

But it will be said that trade is restrained by rules 9 and 16, *i. e.*, the commission rule and the rule forbidding members to deal with those who violate the rules of the exchange. These are usual rules in exchanges. We shall show later on that they are necessary in order properly so carry out and enforce the purposes and rules which promote trade, and which make possible the transaction of the business done by the members—for instance, the rules regulating the commercial conduct and observance of business contracts by the members.

But if these rules did not have that justification; if they stood by themselves; if they were made solely in the interest of the members of the exchange,—the commission rule to maintain a higher charge for the services of the members, and rule 16 for the purpose of limiting the trade of the members of the exchange in buying and selling cattle, and trading with each other,—these rules are not in restraint of trade in any proper sense. And they are, as we shall show, a proper exercise of the right of contract, and are such agreements as the members have the right to make.

In *Master Stevedores' Assn.* v. *Walsh*, 2 Daly, 1, a leading case upon the subject of the legality of associations whose rules establish a minimum rate of compensation for services of the members, the by-laws of the plaintiff association of stevedores provided for a minimum rate of compensation for its members for work, and provided that any member found guilty of working for less than those prices should forfeit to the association twenty-five per cent. of the price fixed for the work. Judge Daly said, upon the question whether this was in restraint of trade:

"This was not a by-law in restraint of trade, for it imposes no restraint upon one party which is not beneficial to the others and is not, as has been shown, prejudicial to the interests of the public."

In *Matthews* v. *Associated Press*, 136 N. Y., 333, Mr. Justice Peckham said of the by-law of a press association forbidding its members to receive and publish the dispatches of any other association covering a like territory and organized for a like purpose:

"The court must itself construe the by-law and must decide as to its tendency, while the intention with which it was passed by those voting for it is entirely immaterial upon this aspect of the case. We do not think the by-law improperly tends to restrain trade, assuming that the business of collecting and distributing news would come within the definition of a trade. The latest decisions in this country and in England show a strong tendency to very greatly circumscribe and narrow the doctrine of avoiding contracts in restraint of trade. The courts do not go to the length of saying that contracts which they now would say are in restraint of trade are, nevertheless, valid contracts, and to be enforced. They do, however, now hold many contracts not open to the objection that they are in restraint of trade which a few years back would have been avoided on that sole ground, both here and in England. The cases in this court which are the latest manifestations of the turn in the tide are cited in the opinion in this case at general term, and are *Match Co.* v. *Roeber*, 106 N. Y., 473, *Hodge* v. *Sloan*, 107 N. Y., 244, *Leslie* v. *Lorillard*, 110 N. Y., 519. So that, when we agree that a by-law which is in restraint of trade is void, we are still brought back to the question, what is a 'restraint of trade', in the modern definition of that term? The authority to make by-laws must also be limited by the scope and purpose of the association. I think this by-law is thus limited and that it is not in 'restraint of trade' as the courts now interpret that phrase."

In *Central Shade Roller Co.* v. *Cushing*, 142 Mass., 353, an agreement between a corporation and three manufacturers, giving the corporation the sole right to buy all the manufacturers might make and the sole right to sell a certain curtain fixture upon commission, the court said:

> "Does the contract impose a restraint as to the manufacture or the sale of appellants' shade rollers which is void and against public policy? The contract certainly puts no restraint upon the production of the commodity to which it relates. It puts no obligation and offers no inducement to any person to produce less than to the full extent of capacity. On the contrary, its apparent purpose is to make prices more uniform and regular, to stimulate and increase production. The contract does not restrict the sale of the commodity. * * * On the contrary, the contract intends that the parties shall make sales, and gives them full power to do so; the only restrictions being that sales not at retail, or for export, shall be in the name of the plaintiff, and reported to it, and the accounts kept by it, and the provision that when any party shall establish an agency in any city or town for the sale of a roller made exclusively for that purpose, no other party shall take orders for the same roller in the same place. To these restrictions, clearly valid, is added the one which affords an argument for the invalidity of the contract, the restriction as to price. * * * Even if such an agreement tends to raise the price of the commodity, it is one which the parties have a right to make. To hold otherwise would be to impair the right of persons to make contract, and to put a price on the products of their own industry."

In *Long* v. *Towl*, 42 Mo., 545, the court held that a contract which did not prohibit the defendant from carrying on the business at any place he might choose, but only limited the manner of carrying it on, and by fixing the prices at which he might buy and sell, and the per-

sons to whom he might sell, was not a restraint of trade according to any proper construction of the rule.

The meaning of "restraint of trade," as applicable to business which is *privati juris*, is also clearly stated in the dissenting opinion in the *Trans Missouri case* (166 U. S., 246–9), and as there stated, has been definitely set at rest in England by the House of Lords in the *Nordenfelt case*.

The act of July 2, 1890, must, as we have said, have some limitations. Not all agreements between two or more persons to limit (restrain) their trade among the states, are necessarily void. For instance, cannot two or more partners in trade, in any event agree or conclude to cut down or limit their trade in a certain commodity or line, in order to assure a profit or prevent a loss, without making themselves liable to conviction for conspiracy? Could the members of a firm in Kansas City, Missouri, by their agreement, or mutual consent, refuse to sell goods to a merchant in Topeka, Kansas? Can live stock commission merchants agree together by the rules of their association, under a penalty, that they will sell diseased animals received from another state? The words "to restrain trade" in the act in question, must have a reasonable construction. They do not mean that persons engaged in commerce among the states must trade without any restraint. If so, then the act itself is to restrain not, to promote trade.

VIII.

The Rules of the appellant association are the valid private contracts of the members.

Rules 9 and 16, as stated, are the principal point of attack. Rule 9 fixes a minimum commission charge; and to make it effective and enforceable and prevent evasions, and to prevent discriminations, the same rule regulates the employment of "solicitors" and forbids the prepayment of charges for messages. Rule 16 provides that members shall not deal with persons who violate the rules of the exchange. Have the members the right to agree on such rules? We maintain they have; because: (1.) The rules aid the carrying out the purpose of the association to promote trade; and (2.) Independent of that, they are a proper exercise of the right of contract.

And first as to the *Commission Rule*,—Rule 16.

The Commission Rule is not opposed to public policy and is the valid agreement of the members.

The evidence shows that the rate of commission by these rules is reasonable and is the usual rate which prevails at other yards. (Pr. Trans., 164–5, 182.)

It is a fact which is within our common knowledge, and is shown by this record (Print. Trans., p. 179), that it is a feature of commercial exchanges throughout the world, which are composed of brokers, to prescribe and fix a schedule of minimum commission charges, and to require observance, and to prohibit evasions thereof. For years a great part of the business of the world has been transacted in observance of such rule. Contracts have been construed and enforced with reference to it. Such

rules are regarded as evidence tending to show what is a reasonable charge. This feature and rule, as well as others, has frequently been brought to the attention of courts in adjudicated cases, and sustained, and judgments based thereon. And it has never been supposed that it was in any way in restraint of trade or opposed to the public interest or public policy. It is a feature of association to promote trade. All of this is amply shown in the argument of Mr. Krauthoff herein. It has long been taken for granted that this rule and agreement to maintain an established schedule of commissions is a proper exercise of the personal right and freedom of contract.

1. This rule tends to maintain uniformity and prevent discrimination in charges for services of commission merchants as between different shippers, and to provide a known and uniform reasonable charge on which shippers as well as commission merchants may rely.

This is not against, but is entirely in line with public policy and with the policy of Congress in its regulations of interstate commerce.

The policy of Congress, so far as it has been declared, has one marked and controlling feature, and that is uniformity of charges for like service and the prevention of discrimination. Clearly these are for the interest and good of the trade. This is the leading purpose of the Interstate Commerce Act, which is the most careful and thoroughly considered and far-reaching legislation which Congress has ever passed to regulate commerce among the states. That act is the most emphatic declaration of a policy. It remains undisturbed by the Trust Act of 1890. Now, assume that the appellants, in the conduct of their business, are instruments of interstate commerce, and that their business is commerce among the states, is

it the policy of Congress to require uniformity and forbid discrimination by a railroad company as between different shippers of live stock, and to make criminal a rule and agreement by which alone uniformity as between different shippers can be secured, and discrimination prevented in the commission charges which a commission merchant at the Kansas City stock yards shall make for selling such live stock. For it will be observed that Congress or a state legislature could not, as they could the charges of a railroad company, directly control or limit the charges which such commission merchant should make for his services, nor prevent his discriminating in such charges as between different shippers, however just and beneficial to commerce such uniformity or prevention of discrimination might be. No shipper has any legal right to the services of a commission merchant at a reasonable rate of charges as he has to the service of a railroad.

But it is plainly an advantage to the trade and to the public, if the public can be regarded as having any interest, that there should be such uniformity. But while not to be compelled so to do by law, a commission merchant may make uniform charges and refuse to discriminate. So, under his right to contract, he may agree with others to do so, and may agree to submit himself to discipline if he violates; and such agreement will be valid and for the public advantage, so far as the public has any interest. The evidence for the government in this case is that the purpose and effect of the commission rule of the appellant's exchange is to maintain a fixed *i. e.*, a uniform rate of commission charges. (Print. Trans., 155.) But that uniformity can be accomplished in an association like that of appellants, only by fixing by such agree-

ment a *minimum* charge; because the competition between the parties tends to keep the charge to such *minimum*. And as the agreement may be terminated by any member at his option by withdrawing from the association, the rate so established cannot be and remain above or more than a reasonable rate for the service under all the circumstances.

The live stock commission business has not any features of a natural monopoly, as Shiras, J., remarked of railroads in his dissenting opinion in the Trans-Missouri case in the Circuit Court of Appeals, which was approved by this court on the appeal. Every commission merchant has, in his employ, men, who can to-morrow start as his competitor, if the profits of such a business, at the rate of commissions fixed, offers larger rewards than his salary.

2. The commission rule is necessary to secure the observance and enforcement of the rule as to commercial conduct. Cutting and demoralization of rates of commission charges is likely to be precipitated by the more unscrupulous broker, whose standing and character would not be sufficient to induce shipments to him without this inducement. And when his rate of charges is below the living or reasonable rate, the temptation is great to make it up in the return of sales. As we have shown, the relation of the broker of live stock to his absent shipper is one of great trust. The broker has it in his power to practice and conceal fraud. The shipper is at a great disadvantage. The Exchange seeks to prevent this and rigidly enforce a high standard of commercial conduct. Plainly, the observance of the rule for a uniform and reasonable commission charge makes this more possible. The rule is called for on this ground.

3. Section 10 of rule 9, regulating the employment of solicitors by members of the Exchange, prevents evasions of the uniform commission rule, and the rebates and discriminations as between different shippers which would be possible, and be practiced, if there were no regulation of the employment of solicitors. If the commission rule is a necessary or reasonable one, it is reasonable that it be observed and enforced. But without section 10 the members found that evasions would occur, and gross discriminations in favor of some shippers as against others. For instance, the easy evasion of the rule against such discrimination by nominally employing certain shippers as solicitors in order really to rebate to them portions of the commissions. Section 11 of the same rule, which forbids the payment by members of messages to the shippers containing market quotations, prevents similar discriminations as between different shippers. All these rules are reasonable, and are called for in order to make the Exchange effective in promoting the trade.

Rule 16 is a reasonable rule.

4. So rule 16 which provides that no member shall do business with any person who violates the rules is reasonable, and called for. If the Exchange is to succeed in its purpose; if its discipline over the commercial conduct and fidelity of its members is to continue, then this rule is essential. If the purposes of the Exchange are themselves beneficent, then this rule is reasonable.

But aside from these reasons which call for these rules, the rules themselves are the private agreements of the members relating to their private occupation. If the purpose of the commission rule were merely to sustain the price of the services of the members, and if the other

provisions which are attacked were adopted only for the business advantage of the members, it is the right of the members to adopt them, of which they cannot be deprived. It will be observed that the rules of the Exchange are confined in their operation to the conduct of the members of the Exchange who agree thereto. There is no interference, so far as the rules of the Exchange seek to control the conduct of any person, with the conduct or business of any person who is not a member of the Exchange. There is no agreement or combination to interfere with the free action of any other person.

These appellants are engaged in an occupation which calls for their personal services. Their commission charges are made for their personal skill, fidelity and service. The commission rule is made under the same right that any man whose labor or service is engaged has to fix upon the price of such labor or service. If it had no other reason except to get more compensation for their services, then this rule and agreement is in principle the same as that which prevails in unions and organizations of workmen. Can locomotive engineers, or brakemen, or stevedores, who are engaged in the service of railroads or steamship lines in inter-state or foreign transportation and commerce, associate together and by their mutual rules and agreements agree with each other to maintain a minimum scale of wages, provided there is nothing in such rules (and there is nothing in the rules here in question) which call upon them or provide for any interference with the free action of other persons? If so, then why may not these commission men enter into such an association?

The decision of this court upon this question will determine the question of the right of men to associate to-

gether and mutually agree upon the price of their services, whether those men are brokers, locomotive engineers or others. We contend that such associations and such agreements and rules are an exercise of the right of contract; that they do no public injury; and that on the other hand they result in public benefit.

And the validity of such a rule or agreement is sustained by the strong weight of authority.

Live Stock Ass. v. *Levy*, 54 N. Y. Superior Ct. R., 32.
Palmer v. *Stevens*, 3 Pick., 188.
Master Stevedores Ass. v. *Walsh*, 2 Daly, 1.
Carew v. *Rutherford*, 106 Mass., 14.
Bowen v. *Mathieson*, 14 Allen, 491.
Snow v. *Wheeler*, 113 Mass., 179.
Commonwealth v. *Hunt*, 4 Metc., 111.
Greenhood Pub. Pol., 658.

And so of rule 16 of the exchange, which provides that no member shall do business with any person violating any of the rules, or with any one who has been expelled or suspended from the exchange.

Carew v. *Rutherford*, 106 Mass., 14.
Bowen v. *Mathieson*, 14 Allen, 499.
Snow v. *Wheeler*, 113 Mass., 179.
Commonwealth v. *Hunt*, 4 Metc., 111, 128.
Bohn Mfg. Co. v. *Hollis*, 54 Minn., 223.
Collins v. *Locke*, L. R., 4 App. Cas., 674.
Macantey v. *Tierney* (R. I.), 33 Atl. Rep., 1.
Central Shade Co. v. *Cushing*, 143 Mass., 353.
Master Stevedores' Assn. v. *Walsh*, 2 Daly, 1.

Live Stock Assn. v. *Levi*, 54 N. Y. Superior Ct. R.

Thomas v. *Musical Union*, 121 N. Y., 45.

Matthews v. *Associated Press*, 136 N. Y., 333.

Ladd v. *Southern Cotton Press Co.*, 53 Tex., 172.

Jones v. *Fell*, 5 Fla., 510.

Long v. *Towl*, 42 Mo., 545.

Brewster v. *Miller's Sons* (Ky.), 38 Lawy. Rep. Ann., 505.

The authorities here cited fully sustain the rules in question as to the proper exercise of the freedom and right of private contract.

The case of *People ex rel.* v. *Chicago Live Stock Exchg.*, 170 Ill., 556, was an application for leave to file an information in *quo warranto* against a corporation. The rules there were the by-laws of a corporation, which the court held not to be within the corporate purpose or power of the corporation. Much said in the opinion was unnecessary to the decision; and is against the great weight of authority; and certainly is inapplicable to the voluntary agreement of competent persons which is here in question, and which the parties thereto are here seeking to defend. This association and its rules, which appellee contends are condemned by the act of Congress, is an exercise of the "privilege of contracting," which is quoted by the court in the case last cited from its opinion in *Frorer* v. *People*, 141 Ill., 181, as follows:

> "The privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in a manner which he has

> hitherto enjoyed under the law, and which B, C and D are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract. Our constitution guarantees that no person shall be deprived of life, liberty or property without due process of law. (Art. 2, Sec. 2.)"

"What one may lawfully do, two or more may lawfully agree to do jointly."

Bohn Mfg. Co. v. *Hollis*, 54 Minn., 223.

As each of the members of this Exchange may do that, which by these rules he agrees to do, his agreement here and the agreement of all, are the exercise of their constitutional right.

This association and its rules are the proper exercise of the freedom of private contract, which was among the liberties guaranteed by Magna Charta.

Mitchel v. *Reynolds*, 1 P. Wms., 181.

And which is secured by our bills of rights, in both the Federal and State constitutions.

Respectfully submitted.

JOHN S. MILLER,

for Appellants.